

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

**JUSTICE HOLDINGS, LLC,**

**Plaintiff/Counterclaim Defendant,**

**vs.**

**Civil Action No.: 21-C-129  
Presiding: Judge Dent  
Resolution: Judge Lorensen**

**GLADE SPRINGS VILLAGE PROPERTY  
OWNERS ASSOCIATION, INC.,**

**Defendant/Counterclaim Plaintiff.**

**and**

**GLADE SPRINGS VILLAGE  
PROPERTY OWNERS ASSOCIATION, INC.,**

**Plaintiff,**

**vs.**

**COOPER LAND DEVELOPMENT, INC.,  
An Arkansas corporation, and  
JUSTICE HOLDINGS, LLC,  
A West Virginia limited liability company,**

**Defendant.**

**ORDER DENYING DEFENDANT COOPER LAND DEVELOPMENT, INC.'S MOTION  
TO EXCLUDE TESTIMONY OF PLAINTIFF'S EXPERT WITNESS CARL H. LISMAN**

This matter came before the Court on *Defendant Cooper Land Development, Inc.'s Motion to Exclude Testimony of Plaintiff's Expert Witness Carl H. Lisman* (the "Motion"). The Plaintiff, Glade Springs Village Property Owners Association, Inc., by counsel, Ramonda C. Marling, Esq., and Defendants, Cooper Land Development, Inc., by counsel, Andrew B. Cooke, Esq., and Justice Holdings LLC, by counsel, Shawn P. George, Esq., have fully briefed the issues

necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

Defendants<sup>1</sup> seek the exclusion of the testimony of Carl H. Lisman, Plaintiff's expert. *See* Def's Mot., p. 1; *see also* Justice Holdings Joinder, p. 1, 2. Specifically, Defendants argue this is appropriate because Mr. Lisman's testimony will usurp the role of the judge because he will impermissibly testify as to questions of law. *See* Def's Mot., p. 6.

This Court, having proper jurisdiction and having been fully advised of the matters herein, **HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

1. As an initial matter, it is well established that "[t]he admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court." *Gen. Pipeline Constr., Inc. v. Hairston*, 234 W. Va. 274, 284 765 S.E.2d 163, 173 (2014).

2. Further, Rule 702 of the West Virginia Rules of Evidence governs expert testimony. Rule 702 provides, in pertinent part:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

W. Va. R. Evid. 702(a).

3. Further, the West Virginia Supreme Court of Appeals has held that "[a]s a general rule, an expert witness may not testify as to questions of law such as the principles of law

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<sup>1</sup> The Court notes Defendant Justice Holdings LLC has joined the instant motion, via its Joinder of Defendant Justice Holdings LLC in Cooper Land Development, Inc.'s Motion to Exclude Testimony of Plaintiff's Expert Witness Carl H. Lisman filed June 15, 2022. *See* court file.

applicable to a case, the interpretation of a statute, the meaning of terms in a statute, the interpretation of case law, or the legality of conduct. It is the role of the trial judge to determine, interpret and apply the law applicable to a case”. Syl. Pt. 10, *France v. S. Equip. Co.*, 225 W. Va. 1, 5, 689 S.E.2d 1, 5 (2010)<sup>2</sup>.

4. Instead, the West Virginia Supreme Court of Appeals has directed that “Rule 702 of the *West Virginia Rules of Evidence* only allows an expert to give an opinion that ‘will assist the trier of fact to understand the evidence or to determine a fact in issue’”. *Id.* at 14, 14. The Court notes the parties do not dispute this black letter law.

5. The Supreme Court further explained:

... [A]n expert's testimony is proper under Rules 702 and 704 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury's understanding to the legal standards upon which their verdict must be based, the testimony should not be allowed. A witness, expert or non-expert, should not be allowed to define the law of the case.

Indeed, it is black-letter law that it is not for witnesses but for the judge to instruct the jury as to applicable principles of law. In our legal system, purely legal questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge. The danger is that the jury may think that the “expert” in the particular branch of the law knows more than the judge—surely an impermissible inference in our system of law.

Because the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Rule 702.

*Id.* citing 2 Franklin D. Cleckley, *Handbook On Evidence For West Virginia Lawyers* § 7-4(B), pp. 7-78-7-79 (2000).

6. Here, Defendants seek this Court to preclude Plaintiff's expert, Mr. Lisman's, testimony,

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<sup>2</sup> See also Syl. Pt. 5, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004).

arguing its purpose is impermissibly directing the jury's understanding to the legal standards upon which their verdict must be based, in violation of West Virginia law. Specifically, Defendants argue that Plaintiff intend to call Dr. Lisman to offer testimony regarding multiple alleged legal duties, including but not limited to, the creation, nature, governance, and operation of common interest communities and the Uniform Common Interest Ownership Act (hereinafter "UCIOA"). *See* Def's Mot., p. 1-2. The Court notes Defendant Cooper Land attached Plaintiff's Expert Witness Disclosure as Exhibit A to the instant motion. *Id.* at Ex. A; *see also Id.* at 1.

7. Further, the POA averred in the Response that it has designated Mr. Lisman to "offer his expert opinion testimony to assist the jury as the fact finder regarding (i) the purposes and aims of common interest communities; (ii) associations governing common interest communities; and (iii) the opportunity for adverse domination of the association by the declarant/developer". *See* Pl's Resp., p. 2. Cooper Land argues that with regard to the topic of adverse domination, the Plaintiff attempts to assert a legal conclusion on equitable principles, based upon a narrow judicial doctrine for which the POA does not qualify and to which the defendants, as corporations, are not subject. *See* Cooper Reply, p. 2.

8. Based on the Court's review of the motion and responsive pleadings, as well as the exhibits, the Court cannot conclude that a blanket prohibition of Mr. Lisman's testimony is appropriate at this stage. The case law has made clear that an expert may testify as to more general information. Specifically, Plaintiff has proffered that Mr. Lisman has been designated an educational expert on the ordinary practices of creating, governing, and operating common interest communities, including with regard to the existence of conditions in new and maturing common interest communities for the potential for adverse domination by the declarant/developer. *See* Pl's Resp.,

p. 6, 7. Further, Plaintiff averred in its response that Mr. Lisman will testify in easy to understand terms to the history of common interest communities and the policies behind the ownership and management of the common elements of common interest communities. *Id.* at 7. Further, Plaintiff averred that it designated Mr. Lisman to explain relevant principles about common interest communities, without testifying “regarding applicable law or to make conclusions of law”. *Id.* at 11. As long as this testimony does not “cross the line” into opining on legal opinions, the Court concludes the anticipated testimony appears that it will be appropriate under the Rules of Evidence and the relevant case law.

9. The Court finds if this type of permissible testimony were to cross over into impermissible testimony regarding legal instruction or statutory interpretation, the proper avenue would be an objection and a limitation of testimony at that time. The Court agrees with Plaintiff that it would be inappropriate to exclude Mr. Lisman as a witness at this stage in the proceedings. *See* Pl’s Resp., p. 9.

10. Taking into account all of the foregoing, the Court finds and concludes that the instant motion shall be denied and Mr. Lisman’s testimony will not be stricken as a whole on the basis laid out in the motion. The instant motion has failed to articulate any basis or good cause to exclude Mr. Lisman at this stage in the proceedings as an educational expert on the creation, nature, governance, and operation of common interest communities, recognizing this can include testimony with regard to the potential for adverse domination by the declarant/developer. The Court notes that it has directed that if this type of permissible testimony were to cross over into impermissible testimony regarding legal instruction or statutory interpretation, the proper avenue would be an objection and a limitation of testimony at that time.

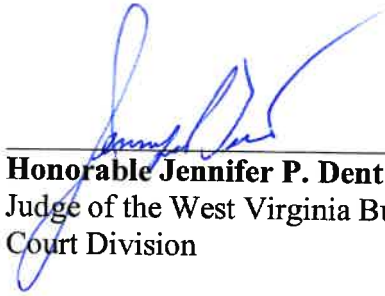
11. The Court further addresses Cooper Land's request in footnote 1 of the instant motion, wherein if the instant motion were to be denied, it requests "leave to address and rebut Mr. Lisman's heretofore unknown testimony by filing a rebuttal expert disclosure within [45] days of an" order denying the instant motion. *See* Def's Mot., p. 1. The Court considers Plaintiff's objections to this request and averment that Scheduling Order entered in this case on December 17, 2021 specifically provided an expert witness deadline of June 15, 2022 for Defendants. Recognizing the Defendants' expert witness deadline expired on June 15, 2022, the same day the instant motion was filed, and considering that Mr. Lisman has yet to be deposed, discovery is still very much ongoing, and we are not upon the eve of trial, the Court finds there would be no prejudice if the Court were to grant Cooper Land's request. For these reasons the Court grants this request. Defendant Cooper Land is hereby directed to provide any rebuttal expert witness disclosure within forty-five (45) days of the entry of this Order.

### **CONCLUSION**

Therefore, it is hereby ADJUDGED, ORDERED and DECREED that *Defendant Cooper Land Development, Inc.'s Motion to Exclude Testimony of Plaintiff's Expert Witness Carl H. Lisman* is hereby DENIED. The Court notes the objections and exceptions of the parties to any adverse ruling herein. It is further hereby ADJUDGED and ORDERED that Defendant Cooper Land Development Inc. shall provide a rebuttal expert witness disclosure, if it chooses, within forty-five (45) days of the entry of this Order.

The Clerk of this Court shall enter the foregoing and forward attested copies hereof to all counsel, to all *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia 25401.

ENTERED this 16<sup>th</sup> day of August 2022.



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**Honorable Jennifer P. Dent**  
Judge of the West Virginia Business  
Court Division